

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 1:11-cv-2039-CAB
)	
RICHARD M. OSBORNE, SR., GREAT)	
PLAINS EXPLORATION LLC, <i>et al.</i> ,)	
)	
Defendants,)	
)	
v.)	
)	
UNITED STATES OF AMERICA,)	
<i>et al.</i> ,)	
)	
Counterclaim Defendants.)	

CONSENT DECREE

WHEREAS, the Court finds that Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency (“EPA”), and Defendants Richard M. Osborne, Sr.; Osair, Inc.; Center Street Investments, Inc.; and Callendar Real Estate Developments Co., LLC (collectively, the “Osborne Defendants”); and Great Plains Exploration, LLC (“Great Plains” and, along with the Osborne Defendants, the “Defendants”), together with Counterclaim Defendants, the United States Army Corps of Engineers (the “Corps”), Lisa Jackson (Administrator, EPA), Susan Hedman (Region 5 Administrator, EPA), David Schulenberg (enforcement officer, EPA), Wendy Melgin (wetland section chief, EPA), Tina Stonemetz (biologist, Corps), Major General Meredith Temple (Acting Chief, Corps), and Lieutenant

Colonel Stephen Bales (Commander, Corps) (“Counterclaim Defendants”), have reached an agreement to settle all claims and counterclaims in this case via entry of this Consent Decree, which the Court finds to be a reasonable and fair settlement of the claims in this case, and which adequately protects the public interest in accordance with the Clean Water Act (“CWA”) and all other applicable law;

WHEREAS, in consideration of this Consent Decree, the Osborne Defendants have agreed to cause to be transferred the “Preservation Area,” defined as the approximately 11 acres in the northwest corner of the “Great Plains Site” and identified in Appendix 1, to the Lake County Land Reutilization Corp. (“Land Bank”) for preservation via a conservation easement with the Lake County Soil and Water Conservation District;

WHEREAS, the United States has agreed to the preservation of this land in lieu of requiring the alleged unauthorized fill to be removed and the Parties agree that the injunctive relief set forth herein appropriately offsets the adverse impacts to wetlands alleged in the United States’ Amended Complaint; and

WHEREAS, the Defendants expressly deny any and all liability to the United States arising out of the transactions or occurrences alleged in the Amended Complaint but agree to be bound by the terms of this Consent Decree in order to avoid the time, expense and uncertainty of further litigation.

THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this case and over the parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

2. Venue is proper in the Northern District of Ohio pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c), because the Defendants conduct or conducted business in this District, the subject property is located in this District, and the causes of action alleged herein arose in this District.

3. For purposes of this Consent Decree only, including any action to enforce this Decree, the Parties agree, and the Court finds, that the Amended Complaint states claims upon which relief may be granted pursuant to Sections 301, 309, and 404 of the CWA, 33 U.S.C. §§ 1311, 1319 and 1344.

II. APPLICABILITY

4. The obligations of this Consent Decree apply to and are binding upon all parties to this action and any successors, assigns, or other entities or persons otherwise bound by law.

5. The Plaintiff and the Osborne Defendants shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties reasonably include compliance with any provision of this Decree.

6. In any action to enforce this Consent Decree, Defendants shall not raise as a defense the failure by any of their officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Decree, except that the agreement of the bankruptcy Trustee for Defendant Great Plains Exploration is subject to approval by the

United States Bankruptcy Court for the Western District of Pennsylvania (“Bankruptcy Court”), Case No. 12-10058-TPA.

7. Any transfer of ownership or other interest in the Preservation Area shall not alter or relieve Defendants of their obligation to comply with all of the terms of this Consent Decree.

8. At least fifteen (15) days prior to the voluntary transfer of ownership or other interest in the Preservation Area (other than the transfer of the Preservation Area as contemplated by this Consent Decree), the party making such transfer shall provide written notice and a true copy of this Consent Decree to its successors in interest and shall simultaneously notify EPA and the United States Department of Justice at the addresses specified in Section XI below that such notice has been given. As a condition to any such voluntary transfer, the transferor shall reserve all rights necessary to comply with the terms of this Consent Decree.

III. CIVIL PENALTIES, AND ADMINISTRATIVE CLAIM WITH RESPECT TO INJUNCTIVE RELIEF

9. Given this Court’s determination that Defendant Richard Osborne, Sr. does not have the ability to pay the civil penalty sought by the United States for the violations alleged in the Amended Complaint, the United States agrees to waive any and all civil penalties against the Osborne Defendants, all of which are owned and controlled by Defendant Osborne, for the CWA violations alleged in the Amended Complaint.

10. Given Great Plains’ Chapter 7 bankruptcy proceeding in the U.S. Bankruptcy Court for the Western District of Pennsylvania, Case No. 12-10058 TPA, Great Plains does not have the ability to pay the civil penalty sought by the United States for the violations alleged in the Amended Complaint. Great Plains is not required to pay a civil penalty under this Consent Decree.

11. Subject to Bankruptcy Court approval of this Consent Decree, the United States on behalf of EPA shall have an allowed administrative claim against Great Plains in the amount of \$20,000 in Great Plains' proceeding in the U.S. Bankruptcy Court for the Western District of Pennsylvania, Case No. 12-10058 TPA. This \$20,000 administrative claim shall be paid by the trustee for Great Plains in full resolution and satisfaction of the secured (if any), administrative and priority amounts claimed by the United States against Great Plains. Any other claim of the United States in the Great Plains bankruptcy shall be subordinated to all other claims in the bankruptcy case. Defendant Great Plains shall make payment in satisfaction of the United States' administrative claim in accordance with the provisions of Paragraph 19 below.

IV. INJUNCTIVE RELIEF

12. Except as in accordance with this Consent Decree, Defendants and Defendants' agents, successors, and assigns are enjoined from discharging any pollutant into waters of the United States located within the Great Plains Site, unless such discharge complies with the provisions of the CWA and its implementing regulations.

13. Within 60 days after entry of this Consent Decree, the Osborne Defendants shall cause title to the Preservation Area to be transferred to the Land Bank, which has stated that it intends to preserve the Preservation Area through a conservation easement with the Lake County Soil and Water Conservation District. The Preservation Area shall be transferred to the Land Bank free and clear of all liens, including property taxes, through the date of closure.

14. Prior to, or at the same time, the Preservation Area is transferred to the Land Bank, the Osborne Defendants shall place a restrictive covenant on the Preservation Area. The restrictive covenant shall state that its purpose is to restrict the current and future use of the

Property in perpetuity in order to protect, restore, and maintain the chemical, physical, and biological integrity of waters of the United States on the Preservation Area, as well as scenic, resource, environmental, and other conservation values of the Preservation Area. The restrictive covenant shall also specifically prohibit construction, cutting vegetation, land surface alteration, dumping, altering water courses, and creating recreational trails and vehicle use on the Preservation Area.

15. To the extent the Preservation Area is not accessible via public roadways, the Osborne Defendants shall cause a permanent access easement or another form of right-of-way to the Preservation Area so that the Land Bank may inspect and manage the Preservation Area.

16. The Osborne Defendants shall not mow, cut, clear, cultivate, dredge, excavate, farm, fill, dewater, drain or otherwise alter in any manner whatsoever the Preservation Area, except as approved in writing by EPA. Nothing in this provision shall be construed as prohibiting the Osborne Defendants from engaging in lawful activities outside of the Preservation Area which may have an incidental, *de minimis* impact on the Preservation Area.

17. In addition to the United States' statutory authority to conduct inspections, require monitoring, and obtain information from the Defendants as authorized by law, until termination of this Consent Decree, the United States and its authorized representatives and contractors shall have, upon prior notification, and at reasonable times with proper identification, authority at all reasonable times to enter the Preservation Area to:

- 1) Monitor compliance with this Consent Decree; and
- 2) Obtain samples.

18. To the extent the Preservation Area is not accessible via public roadways, the Osborne Defendants shall allow EPA and the Corps to enter via the same access easement onto the Preservation Area contemplated in Paragraph 15 for purposes of exercising the rights of the United States under Paragraph 17.

19. Within 60 days after the entry of this Consent Decree, subject, however, to Bankruptcy Court approval after notice and hearing on an appropriate motion therefor, Great Plains shall deposit \$20,000 with the Clerk of the U.S. District Court for the Northern District of Ohio. The Clerk shall disburse the funds deposited to the Lake County Soil and Water Conservation District for the purpose of funding the District's conservation of the Preservation Area in perpetuity, upon application by Plaintiff United States of America.

20. In the event that the United States does not submit an application for the Court to disburse the funds deposited to the Lake County Soil and Water Conservation District, the Court shall order the funds to be disbursed in an appropriate manner to assist in the completion of the alternate injunctive relief required of the Osborne Defendants upon an application by Plaintiff United States of America.

V. ALTERNATE INJUNCTIVE RELIEF

21. The Parties acknowledge that the Preservation Area consists of a portion of two separate parcels of land, both of which are the subject of foreclosure proceedings in the Common Pleas Court for Lake County, Ohio, and forfeiture to the state pursuant to O.R.C. § 5723.01, such that the Osborne Defendants' ability to transfer title to the Preservation Area is contingent on their redemption of the property pursuant to O.R.C. § 2723.03. The Osborne Defendants have

represented that they intend to redeem those properties in fulfillment of their obligations under the Consent Decree.

22. In the event that the Osborne Defendants are unable to redeem the parcels comprising the Preservation Area, the Osborne Defendants may petition the Court to relieve them of their obligation to perform the injunctive relief set forth in Section IV. The Court shall only relieve the Osborne Defendants of their requirements upon finding that the Osborne Defendants had good cause for failing to redeem the parcels comprising the Preservation Area. In the event that the Court relieves the Osborne Defendants of their specific obligations under Section IV, the Osborne Defendants shall perform alternate injunctive relief as may be ordered by the Court.

23. The alternate injunctive relief shall remedy the violations alleged in the Complaint in accordance with the requirements of the Clean Water Act and the standard set forth in *United States v. Sexton Cove Estates, Inc.*, 526 F. 2d 1293 (5th Cir. 1976). Accordingly, any injunctive relief should “(1) be designed to confer maximum environmental benefits tempered with a touch of equity; (2) be practical and feasible from an environmental and engineering standpoint; (3) take into consideration the financial resources of defendants; and (4) include consideration of defendants' objections.” *United States v. Bailey*, 516 F. Supp. 2d 998, 1015 (D. Minn. 2007).

24. The United States and the Osborne Defendants may submit proposals for alternate injunctive relief for the Court’s consideration.

VI. RETENTION OF RECORDS

25. Until the termination of this Consent Decree, the Osborne Defendants shall preserve and retain all records and documents now in their possession or control or which come

into their possession or control that relate in any manner to the Preservation Area, regardless of any corporate retention policy to the contrary.

VII. DISPUTE RESOLUTION AND FORCE MAJEURE

26. A dispute shall be considered to have arisen when a written Notice of Dispute is transmitted to the opposing party at the addresses specified in Section XI. Such Notice of Dispute shall state clearly the matter in dispute. If 30 days after the transmittal of the Notice of Dispute, the complainant concludes that the Parties have reached an impasse, then the complainant may seek resolution of the dispute by the Court. The Parties may continue to attempt to resolve the Notice of Dispute while the matter is pending before the Court.

27. Defendants shall perform the actions required under this Consent Decree within the time limits set forth or approved herein, unless the performance is prevented or delayed solely by events which constitute a Force Majeure event. A Force Majeure event is defined as any event arising from causes beyond the control of Defendants.

28. The Osborne Defendants' failure to redeem the Preservation Area and transfer it to a third party for preservation shall be governed by the provisions of Section V rather than this Section. As to all other actions required under this Consent Decree, if Defendants believe that a Force Majeure event has affected Defendants' ability to perform, Defendants shall notify the United States in writing within seven (7) calendar days after the event at the addresses listed in Section XI. Such notice shall include a discussion of the following:

- A. what action has been affected;
- B. the specific cause(s) of the delay;
- C. the length or estimated duration of the delay; and

D. any measures taken or planned by the Defendants to prevent or minimize the delay and a schedule for the implementation of such measures.

Failure to provide timely and complete notification to the United States shall constitute a waiver of any claim of Force Majeure as to the event in question.

VIII. STIPULATED PENALTIES

29. Due to the pending bankruptcy proceedings for Defendants Great Plains in the U.S. Bankruptcy Court for the Western District of Pennsylvania, Case No. 1:12-bk-10058, and Richard Osborne in the Bankruptcy Court for the Northern District of Ohio, Case No. 17-bk-17361, the United States is waiving the requirement for stipulated penalties of a sum certain for non-compliance with this Consent Decree. However, the parties expressly agree that the Court may assess daily monetary penalties on Defendants for non-compliance with this Consent Decree in accordance with Section XIV. Notwithstanding anything to the contrary herein, neither the Defendant Great Plains nor its bankruptcy trustee shall have any further responsibilities to any party or non-party regarding this matter after the \$20,000 payment has been made.

IX. SCOPE OF CONSENT DECREE

30. This Consent Decree shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties alleged in the Amended Complaint against the Defendants under CWA Section 301 concerning the Great Plains Site, as well as the complete and final settlement of all civil claims for relief and civil penalties alleged in the Counterclaim against the Counterclaim Defendants. Further, and notwithstanding anything to the contrary contained herein, upon approval of this Consent Decree by the above captioned Court and by the Bankruptcy Court, and after completion of Great Plains' obligations under Paragraph 19, neither

Great Plains nor Guy C. Fustine, Bankruptcy Trustee for Great Plains shall have further liability or responsibility whatsoever with regard to, or in connection with, the above captioned matter.

31. The parties acknowledge that Nationwide Permit 32, found at 82 Fed. Reg. 1,860, 1,992 (Jan. 6, 2017), authorizes any fill that was placed as of the effective date of this Consent Decree, within the Great Plains Site boundaries, as identified in Appendix 2, to remain in place, subject to the terms and conditions provided in Nationwide Permit 32 and this Consent Decree. Further, the parties acknowledge that the areas identified as Uplands in Appendix 1 do not currently constitute “navigable waters” under CWA section 502(7), 33 U.S.C. § 1362(7), or “waters of the United States” under 33 C.F.R. § 328.3(a), and that the identification of said areas as Uplands shall have the same force and effect as an approved jurisdictional determination by the Corps, valid for a period of five (5) years from the date of this Consent Decree.

32. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to Sections 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344, or any other law. Nothing in this Consent Decree shall limit the ability of the United States Army Corps of Engineers to issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional general permit.

33. The parties reserve all legal and equitable remedies available to enforce the provisions of this Consent Decree. This Consent Decree shall not be construed to limit the rights of the United States to obtain remedies under the CWA, its implementing regulations, or under other federal laws, regulations, or permit conditions, except as provided herein or as otherwise provided by applicable bankruptcy law.

34. Defendants are responsible for complying with all applicable federal, state, and local laws, regulations, and permits with respect to the Great Plains Site, and Defendants' compliance with this Consent Decree shall not be dispositive of any action commenced pursuant to any such laws, regulations, or permits, except as set forth in this Decree.

35. This Consent Decree does not limit or affect the rights of Defendants or of the United States against any third parties, not party to this Consent Decree, nor does it limit the rights of third parties, not party to this Consent Decree, against Defendants, except as otherwise provided by law.

36. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree. Notwithstanding this provision, the acknowledgments set forth in Paragraph 31 above shall survive any transfer of ownership of property within the Great Plains Site boundaries.

X. COSTS OF SUIT

37. Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action.

XI. ADDRESSES

38. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses:

A. TO EPA:

Wendy Melgin
United States Environmental Protection Agency
Region 5
77 West Jackson Boulevard (WW-16J)
Chicago, IL 60604

B. TO THE UNITED STATES DEPARTMENT OF JUSTICE

Phillip R. Dupré, Attorney
Kate R. Bowers, Attorney
Environmental Defense Section, ENRD
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044

C. TO THE OSBORNE DEFENDANTS:

Richard M. Osborne
7001 Center Street
Mentor, OH 44060

D. TO GREAT PLAINS:

Guy Fustine, Esquire, Trustee
Knox McLaughlin Gornall & Sennett, P.C.
120 West 10th Street
Erie, PA 16501-1461

39. Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above.

XII. EFFECTIVE UPON BANKRUPTCY COURT APPROVAL

40. This Consent Decree is conditioned upon and shall only become effective upon Great Plains receiving the approval of the United States Bankruptcy Court for the Western District of Pennsylvania. Promptly upon receipt of such approval, Great Plains shall file Notice thereof with this Court.

XIII. PUBLIC COMMENT

41. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold

or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. The Defendants agree not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree, unless the United States has notified the Defendants in writing that it no longer supports entry of the Consent Decree or if the Consent Decree is not approved by the Bankruptcy Court after notice and hearing as required by applicable bankruptcy law.

XIV. CONTINUING JURISDICTION OF THE COURT

42. This Court shall retain jurisdiction over this action in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of this Consent Decree. During the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to construe and effectuate the Consent Decree. In the event the Court finds that a party has violated this Consent Decree, the Court may impose sanctions on that party, including but not limited to monetary penalties or additional injunctive relief, if appropriate.

XV. MODIFICATION

43. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. Any modification of this Consent Decree shall be in writing and shall not take effect unless signed by both the United States and the Defendants and approved by the Court and approved by the Bankruptcy Court as it pertains to Defendant Great Plains.

XVI. TERMINATION

44. This Consent Decree shall expire as to each Defendant twelve (12) months following its entry, unless at that time a motion to resolve a dispute is pending before the Court pursuant to Paragraph 26 or the Osborne Defendants have yet to complete any and all alternate injunctive relief ordered by the Court as set forth in Section V, in which case the Consent Decree does not expire as to the Defendant(s) involved in the motion until its resolution or the alternate injunctive relief is completed. This Consent Decree may also be terminated upon a joint motion by Defendants and the United States.

45. Termination of this Consent Decree does not extinguish the requirements of Paragraph 16 or the validity of the acknowledgments of Paragraph 31, above.

XVII. SIGNATORIES/SERVICE

46. Each undersigned representative of Defendants and the Acting Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

47. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. Defendants agree to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

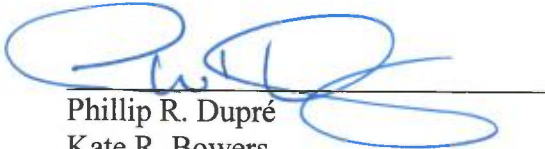
The Court finds that this Consent Decree is fair, reasonable, consistent with the Clean Water Act, and in the public interest. IT IS SO ORDERED.

Dated and entered this _____ day of _____, 2018.

United States District Judge
Christopher A. Boyko

ON BEHALF OF THE UNITED STATES:

JEFFREY H. WOOD
Acting Assistant Attorney General
Environment and Natural Resources Division



Phillip R. Dupré
Kate R. Bowers
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044

Dated: Aug 10, 2018

EPA, Office of Enforcement and Compliance Assurance

Susan Parker Bodine
Assistant Administrator for Enforcement
and Compliance Assurance
U.S. Environmental Protection Agency

Dated: _____

EPA, Region 5

T. Leverett Nelson
Regional Counsel
U.S. Environmental Protection Agency, Region 5

Dated: _____

ON BEHALF OF THE UNITED STATES:

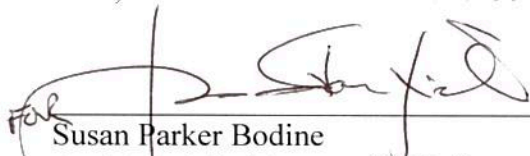
JEFFREY H. WOOD

Acting Assistant Attorney General
Environment and Natural Resources Division

Dated: _____

Phillip R. Dupré
Kate R. Bowers
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044

EPA, Office of Enforcement and Compliance Assurance



Susan Parker Bodine
Assistant Administrator for Enforcement
and Compliance Assurance
U.S. Environmental Protection Agency

Dated: 8/2/2018

EPA, Region 5

Dated: _____

T. Leverett Nelson
Regional Counsel
U.S. Environmental Protection Agency, Region 5

ON BEHALF OF THE UNITED STATES:

JEFFREY H. WOOD
Acting Assistant Attorney General
Environment and Natural Resources Division

Dated: _____

Phillip R. Dupré
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Washington, D.C. 20044

EPA, Office of Enforcement and Compliance Assurance

Dated: _____

Susan Parker Bodine
Assistant Administrator for Enforcement
and Compliance Assurance
U.S. Environmental Protection Agency

EPA, Region 5



T. Leverett Nelson
Regional Counsel
U.S. Environmental Protection Agency, Region 5

Dated: 7/30/2018

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FOR THE OSBORNE DEFENDANTS

Richard M. Osborne, Sr.
Richard M. Osborne, Sr.

Dated: 7/20/18

FOR GREAT PLAINS:



Guy C. Fustine, Chapter 7 Trustee

Dated: 7/13/18

